THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

NATIONAL PORTRAIT GALLERY OF AUSTRALIA BILL 2012

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Regional Australia, Regional Development and Local Government, the Minister for the Arts, the Honourable Simon Crean MP)
NATIONAL PORTRAIT GALLERY OF AUSTRALIA BILL 2012

OUTLINE

The National Portrait Gallery of Australia Bill 2012 (the Bill) provides for the establishment of the National Portrait Gallery of Australia (the Gallery) as a Commonwealth statutory authority subject to the Commonwealth Authorities and Companies Act 1997 (the CAC Act).

The Bill establishes the Gallery as a body corporate with a Board consisting of a Chair, a Deputy Chair and between three and seven other members. The Gallery’s staff will comprise a Director and persons engaged under the Public Service Act 1999.

As a consequence of this Bill, the Gallery will cease to operate as a Branch within the Department of Regional Australia, Local Government, Arts and Sport.

Financial impact statement

The National Portrait Gallery of Australia Bill 2012 is not expected to have an impact on Commonwealth expenditure.
Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011


This Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the Human Rights (Parliamentary Scrutiny) Act 2011.

This Bill does not engage any of the applicable rights or freedoms and is compatible with human rights as it does not raise any human rights issues.
NATIONAL PORTRAIT GALLERY OF AUSTRALIA BILL 2012

NOTES ON CLAUSES

Part 1 - Preliminary

Clause 1: Short title

1. This clause is a formal provision specifying the short title of the Bill. The Bill, when enacted, should be cited as the National Portrait Gallery of Australia Act 2012.

Clause 2: Commencement

2. The Bill will commence on 1 July 2013.

Clause 3: Simplified outline

3. This provision is a simplified outline of the Bill.

Clause 4: Definitions

4. Clause 4 sets out definitions of key terms used in the Bill. The most significant of these are:
   - ‘Director’, which is the Director of the Gallery, a position with similar responsibilities to what is commonly called a Chief Executive Officer of an organisation; and
   - ‘national collection’, which references the description of the national collection contained at paragraph 7(1)(a) of the Bill, as ‘a national collection of portraits, other works of art and related material, including portraits that reflect the identity, history, diversity and culture of Australia’. The terms ‘other works of art’ and ‘related material’ are meant to include the items held by, or which may be acquired by, the Gallery that may not be classified as portraits in a traditional or conventional sense.

Clause 5: Extended geographic application of this Act

5. Clause 5 of the Bill makes it clear that the operation of the Bill will extend to every external territory and will apply both within and outside of Australia.

6. This clause has been included to ensure that the Gallery can engage in activities overseas and that in developing, preserving, maintaining, promoting, and providing access to a national collection, the Gallery is not limited to functioning in Australia alone. The Gallery may provide access to the national collection in all States and Territories of Australia as well as internationally. For example, in performing its function of providing access to the national collection (paragraph 7(1)(a)) the Gallery might exhibit works of art at an overseas gallery.

7. In addition Australian national institutions have a role in regional and international activities, such as the collection of significant portraiture of relevance to Australia, either directly or indirectly.
Part 2 – The National Portrait Gallery of Australia

Clause 6: Establishment

8. Subclause 6(1) of the Bill will establish the Gallery.

9. Subclause 6(2) of the Bill confirms that the Gallery, as established, will be a body corporate, with a seal, that may acquire, hold and dispose of real and personal property and that may sue and be sued. By subclause 6(3) of the Bill, the use of the seal of the Gallery will be only under authorisation by the Board.

10. The Gallery would, after its establishment, be a ‘Commonwealth authority’ under the CAC Act.

Clause 7: Functions

11. This clause sets out the Gallery’s functions and how it may perform them. The Gallery’s most important activities will be those related to the national collection of portraits in its custody. However, the Gallery will also be able to undertake activities relating to portraiture that do not directly involve the national collection. Within Australia, the Gallery has a role in promoting greater understanding and awareness of portraiture.

12. Subclause 7(1) provides that the functions of the Gallery are to:
   • develop, preserve, maintain, promote and provide access to a national collection of portraits, other works of art and related material, including portraits that reflect the identity, history, diversity and culture of Australia; and
   • develop and engage a national audience in relation to that collection and other works of art and related material that are, or that will be, in the possession of the Gallery, including through exhibitions, education, research, publications and public and online programs.

13. The first of these functions provides a description of a ‘national collection’ that reflects the primacy of portraits in the Gallery’s collection, including portraits that reflect the identity, history, diversity and culture of Australia. The functions also recognise the diversity of other works of art and related material in the national collection which would generally include material that has a connection with portraiture or enhance the meaning of portraits held in the collection. It is intended that the national collection is broadly defined to capture all material which is accessioned into the Gallery’s collection even though that material may not be classified as a work of art, in the traditional or conventional sense (such as ephemera type collections). Therefore ‘related material’ has been included to ensure these significant items are viewed as items in the national collection, for the purposes of other sections of the Bill which detail how the collection is to be treated. Consistent with accepted practice for a collecting institution, the Board of the Gallery will establish an acquisitions policy, setting out guidelines for what are considered appropriate acquisitions for the collection.
14. The national collection specifically and primarily is made up of portraits that reflect the identity, history, diversity and culture of Australia and will continue to do so. Paragraph 7(1)(a), while not exhaustive, is broad in scope and may include portraits of non-Australians who have some connection to the history or development of Australia.

15. The second function of the Gallery, developing and engaging a national audience is also broad in scope. It includes and contemplates the likelihood of the Gallery hosting or collaborating on international exhibitions which relate to portraiture, as well as other exhibitions of touring work or works held temporarily.

16. Subclause 7(2) provides that in performing its functions the Gallery, as far as practical, must make the most advantageous use of the national collection in the national interest. The subclause also provides that the Gallery will, in performing its functions, promote the efficient, effective, economical and ethical use of public resources. In line with this provision it is expected that the Gallery will, where practical, collaborate with other national collecting institutions, on developing strategies for service sharing in appropriate areas.

Fees
17. Subclause 7(3) of the Bill enables the Gallery to charge fees for things done in the performance of its functions or for other services provided by the Gallery, for example, charging for admission to public exhibitions and programs, fees for the loan of artwork or fees for services rendered by the Gallery. It is expected that revenue generated by the Gallery charging fees will, in conjunction with philanthropic ventures, be expended by the Gallery in support of its core functions.

Clause 8: Powers
18. Subclause 8(1) enables the Gallery to do all things necessary or convenient to be done for, or in connection with, the performance of its functions as described in clause 7.

19. Subclause 8(2) makes it clear that the Gallery has a number of specific powers. These powers are included for the avoidance of doubt and are a non-exhaustive list of specific powers of the Gallery. These specific powers include the power to:
   • enter into contracts;
   • occupy, use and control any land, building, structure or other improvement made available to the Gallery in accordance with clause 9;
   • purchase or take on hire, to commission or produce, or to accept as a gift or on deposit or loan, works of art or related material;
   • make available (whether by hire, loan or otherwise) works of art or related material;
   • provide financial assistance to persons (whether by way of loan, grant, award or otherwise and whether on commercial terms or otherwise);
   • to accept gifts, devises, bequests and assignments (whether on trust or otherwise);
   • act as trustee of money or other property vested in the Gallery on trust; and
   • do anything incidental to any of its functions.
20. As the list in subclause 8(2) in non-exhaustive, it expected that the Gallery will have the power to do other things related to the normal functioning of a collecting institution including the ability to dispose of property (in accordance with other provisions under the Bill) and the ability to raise funds for the purpose of performing the functions of the Gallery.

21. Subclause 8(3) provides that despite anything contained in the Bill, any money or other property held by the Gallery on trust must be dealt with in accordance with the obligations of the Gallery as trustee of the trust.

**Clause 9: Land for the Gallery**

22. This clause enables the Minister to make available Commonwealth land and buildings to the Gallery by notice published in the Gazette. This provision will ensure the continued use of the Gallery’s purpose built building which is located on Commonwealth land in the Parliamentary Zone at Parkes in the Australian Capital Territory. However, this clause will not involve a legal transfer of interest in the land ensuring that the Commonwealth retains ultimate control over its land. This provision is in accordance with other Commonwealth collecting institutions on Commonwealth land. Like those institutions, ownership of the land and building will remain with the Commonwealth, but the administrative responsibility will rest with the Gallery.

23. Although a notice by the Minister does not have the effect of a transfer or disposal of Commonwealth land or buildings, subclause 9(2) makes it clear that the notice will have effect despite anything contained in the Lands Acquisition Act 1989 (LA Act). The clause is not intended to exempt any future activities of the Gallery from any obligations it may have under the LA Act.

24. A notice made by the Minister under subclause 9(1) will not be a legislative instrument, as it will not be legislative in character and therefore not within the meaning of section 5 of the Legislative Instruments Act 2003. Subclause 9(3) confirms this and is included to assist readers.

**Clause 10: Transfer of works of art and related material**

25. This clause enables the Minister to transfer works of art, owned by the Commonwealth, into the collection of the Gallery. By allowing the Board to request this transfer, it is intended that the Board can, prior to the transfer, determine that the work of art is appropriate for the national collection and its acceptance by the Board is in accordance with the Gallery’s acquisitions policy.

26. This clause also enables the Minister to make such transfers of portraits, other works or art or related material, despite limitations on the transfer of Commonwealth property which may otherwise exist in the Financial Management and Accountability Act 1997 (FMA Act).
Clause 11: Disposal of works of art and related material

27. This clause enables the Gallery to dispose of portraits, other works of art and related material from the national collection subject to certain limitations. Where the Board is satisfied that an item in the national collection ‘is unfit for that collection’ or ‘is not required as part of that collection’ the Board may resolve to dispose of the item by way of sale, exchange, gift or destruction. Subclause 11(2) provides that the Board may dispose of an item by way of destruction only where the Board is satisfied that the work has no saleable value.

28. The process for resolving that an item in the national collection may be disposed of is subject to clause 47 of the Bill, which imposes restrictions on financial transactions of the Gallery.

29. Material, including works of art, that is not considered to be part of the national collection, such as material owned by the Gallery for study purposes, is not subject to this clause.

Clause 12: Gallery does not have privileges and immunities of the Crown

30. This clause makes it clear that that the Gallery does not have the privileges and immunities of the Crown in right of the Commonwealth, other than those provided by legislation or the Constitution.

Part 3 – The Board of the National Portrait Gallery of Australia

Division 1 – The Board

Clause 13: Establishment

31. This clause establishes the Board of the National Portrait Gallery of Australia.

Clause 14: Role

32. Clause 14 sets out the role of the Board of the Gallery. The Board is responsible for the proper and efficient performance of the Gallery’s functions and has the power to do all things necessary or convenient to be done for or in connection with the performance of its duties.

33. Subclause 14(3) provides that all acts and things done in the name of, or on behalf of, the Gallery by the Board, or with the authority of the Board, are taken to have been done by the Gallery.

34. It is intended that the Gallery acts through the Board and it has the capacity to conduct the ordinary business of the Gallery, including setting policies and procedures. The Board is also able to authorise the Director or other staff of the Gallery to carry out specific activities in relation to the activities and administration of the Gallery.
35. Subclause 14(4) allows all things done in the name of, or on behalf of, the Gallery by the Board, or with the authority of the Board, to be done on the basis of the subjective opinion, belief or state of mind of the person or body doing them.

Clause 15: Membership

36. This clause makes it clear that the Board will consist of the Chair, the Deputy Chair and between three and seven other members.

37. Subclause 32(6) provides that the Director of the Gallery must not be a member of the Board. This provision would not prevent the Board having the Director as an observer at Board meetings or attending particular Board meetings for particular purposes.

Clause 16: Appointment of Board Members

38. Subclause 16(1) enables the Minister to appoint Board members by written instrument. An instrument of appointment made under this subclause would not be a legislative instrument by virtue of the existing exemption in item 9 of Part 1 of Schedule 1 to the Legislative Instruments Regulations 2004.

39. Subclause 16(2) provides that a person appointed to the Board should have knowledge and experience relevant to the affairs of the Gallery. It is intended that the Board has a skills mix that enables the development and advancement of the Gallery’s varied activities and responsibilities.

40. Subclause 16(3) provides that a person appointed as a member of the Board holds office on a part-time basis. Subclause 16(4) provides that a member may be appointed for up to 3 years, and subclause 16(5) provides that a person’s total period of appointment as a member (whether made up of consecutive or non-consecutive periods) may not exceed 9 years.

41. Subclause 16(6) provides that the performance of the functions, or the exercise of the powers, of the Board is not affected by reason only of the number of members falling below 5 (which is the minimum allowed by clause 15), but not below 3 (which is the minimum number considered necessary for appropriate decision making processes) for a period of not more than 12 months. This provision is included to ensure the continued functioning of the Board in unforeseen circumstances where appointments to the Board may be delayed but to provide a number beyond which the Board should not function.

Clause 17: Acting Board Members

42. This clause enables:
   • the Deputy Chair to act as the Chair when there is no Chair or the Chair is unavailable, and provides that when acting, the Deputy Chair may exercise all the Chair’s powers and perform all the Chair’s functions (and while the Deputy Chair is so acting as the Chair, this Bill and any Act apply to the Deputy Chair as if he or she were the Chair);
   • the Minister to appoint a member to act as the Deputy Chair when there is no Deputy Chair, or the Deputy Chair is unavailable or acting as Chair; and
• the Minister to appoint a person to act as a member when there is a vacancy in the office of a member or the member is unavailable or acting as Deputy Chair.

43. This provision is included to enable, so far as possible, the continuing and effective functioning of the Board in the absence of the Chair or Deputy Chair.

44. Instruments of appointment made under this clause would not be legislative instruments by virtue of the existing exemption under item 9 of Part 1 of Schedule 1 to the *Legislative Instruments Regulations 2004*.

**Clause 18: Remuneration**

45. Subclause 18(1) provides that a member is to be paid such remuneration as is determined by the Remuneration Tribunal or, if no determination of that remuneration is in operation, the member is to be paid such remuneration as is prescribed in the regulations. Subclause 18(2) provides that a member is to be paid such allowances, if any, as are prescribed in the regulations.

46. Subclause 18(3) makes it clear that subclauses 18(1) and 18(2) have effect subject to the *Remuneration Tribunal Act 1973*.

**Clause 19: Leave of absence**

47. This provision enables the Minister to grant the Chair leave of absence on such terms and conditions as the Minister determines. This provision also enables the Chair to grant another member of the Board leave of absence on such terms and conditions as the Chair determines.

48. A grant of leave under this provision would not be a legislative instrument, by virtue of the existing exemption under item 11 of Part 1 of Schedule 1 to the *Legislative Instruments Regulations 2004*.

49. Subclause 14(3) provides that the Chair must notify the Minister if he or she grants to a Board member leave of absence for a period exceeding 4 months. Such a notification would not be a legislative instrument, by virtue of the existing exemption under item 20(a) of Part 1 of Schedule 1 to the *Legislative Instruments Regulations 2004*.

**Clause 20: Resignation**

50. Clause 20 enables a member to resign by giving the Minister a written resignation.

51. Such a notice would not be a legislative instrument, by virtue of the existing exemption under item 10 of Part 1 of Schedule 1 to the *Legislative Instruments Regulations 2004*. 

Explanatory Memorandum - National Portrait Gallery of Australia Bill 2012
Clause 21: Termination of appointment

52. This clause sets out the grounds upon which the Minister may, and in some cases must, terminate the appointment of a Board member.

53. Subclause 21(1) enables the Minister to terminate the appointment of an individual member for misbehaviour or physical or mental incapacity. This is a non-mandatory provision and is subject to the discretion of the Minister.

54. Subclause 21(2) sets out situations where the Minister must terminate the appointment of a member. These include if:
   - the member becomes bankrupt, applies for relief from bankruptcy, enters into an arrangement with creditors regarding the payment of his or her debts, or assigns all or part of his or her remuneration for the benefit of creditors;
   - the member is absent without leave from three consecutive meetings of the Board;
   - the member fails, without reasonable excuse, to comply with obligations under section 27F or 27J of the CAC Act. Section 27F requires a director of a Commonwealth authority to give other directors notice of any material personal interest in a matter which relates to the affairs of the authority, with certain exceptions. Section 27J prevents a director who has a material personal interest in a matter which is being considered by directors from being present when that matter is being considered or voting on it, with certain exceptions.

55. An instrument of termination of appointment made under this provision would not be a legislative instrument, by virtue of the existing exemption under item 9 of Part 1 of Schedule 1 to the Legislative Instruments Regulations 2004.

Clause 22: Other terms and conditions

56. This clause enables the Minister to determine the terms and conditions on which a member holds office except where provided for in the Bill.

57. An instrument specifying terms and conditions of appointment would not be a legislative instrument, by virtue of the existing exemption under item 11 of Part 1 of Schedule 1 to the Legislative Instruments Regulations 2004.

Division 2 – Procedures of the Board

Clause 23: Convening of meetings

58. This clause requires the Chair to convene meetings of the Board as necessary for the efficient conduct of the Gallery’s affairs. However subclause 23(2) requires at least 2 meetings of the Board be held each calendar year. This minimum requirement has been included as a measure to ensure the appropriate functioning of the Board.
59. Clause 23 includes a requirement that the Chair must convene a meeting of the Board if:
   • directed to do so by the Minister – subclause 23(3); or
   • he or she is so requested by a majority of the current Board members in writing – subclause 23(4).

Clause 24: Quorum

60. The quorum for a meeting as provided by subclause 24(1) is a majority of the current members appointed at the time. However, subclause 24(2) provides that if section 27J of the CAC Act (which deals with conflicts of interest) requires a member not to be present during deliberations or to take part in a decision in relation to a matter and this member’s absence takes the meeting below quorum, the remaining members constitute a quorum in relation to that matter. This subclause is included to ensure the continuing and effective functioning of the Board.

Clause 25: Presiding at meetings

61. Clause 25(1) requires the Chair to preside at all meetings at which he or she is present. In the absence of the Chair, the Deputy Chair is to preside (subclause 25(2)). In the absence of both the Chair and the Deputy Chair, subclause 25(3) enables the members present to elect one of their number to preside at that meeting.

62. This clause is included to ensure the effective functioning of the Board.

Clause 26: Voting at meetings

63. Under subclause 26(1), a question arising at a Board meeting is to be decided by a majority of members present and voting.

64. Subclause 26(2) provides that the person presiding at a meeting will have a deliberative vote and, in the event of an equality of votes, also have a casting or deciding vote. This subclause is included to ensure the effective functioning of the Board.

Clause 27: Minutes

65. Clause 27 requires the Board to keep a record of its meetings and, in particular, a record of its decisions.

Clause 28: Conduct of meetings

66. Subject to the limitations contained in this Bill and the requirements of the CAC Act, this clause enables the Board to regulate its proceedings at its meetings as it thinks fit. This clause makes clear the independence of the Board as a Commonwealth authority under the CAC Act.
Clause 29: Decisions without meetings

67. Clause 29 enables the Board to determine that decisions can be made without a meeting and also the method by which Board members are to indicate agreement with proposed decisions.

68. Subclause 29(1) provides that a resolution in relation to the matter or matters will be taken to have been passed as if at a meeting of the Board if:
   - without meeting, a majority of members entitled to vote on the proposed decision indicate their agreement; and
   - that agreement is in accordance with the method determined by the Board; and
   - all members were informed of the proposed decision, or reasonable efforts had been made to inform them of it.

69. Subclause 29(2) provide that subclause 29(1) only applies if the Board determines it may make decisions of that kind without a meeting and has also determined the method by which members are to indicate agreement to a proposed decision.

70. A member may not vote on a proposed decision if they would not be entitled to vote on the proposed decision if the matter had been considered at a meeting of the Board (subclause 29(3)).

71. The Board must keep a record of decisions made in accordance with clause 29 (subclause 29(4)).

72. This clause is included to ensure the effective functioning of the Board.

Part 4 – Director, staff and consultants

Division 1 – Director

Clause 30: Establishment

73. This clause requires that there is a Director of the Gallery.

Clause 31: Role

74. The Director is responsible for the day-to-day administration of the Gallery (subclause 31(1)), and has the power to do all things necessary or convenient to be done for or in connection with the performance of his or her duties (subclause 31(2)). The role of the Director is analogous to what is commonly referred to as a Chief Executive Officer of an organisation.

75. The Director must act in accordance with any policies and directions given by the Board (subclause 31(3)), except in relation to the Director’s performance of functions or powers under the Public Service Act 1999 (subclause 31(4)).
76. Such policies and directions, should they be in writing, are administrative, not legislative in character and therefore not within the meaning of section 5 of the *Legislative Instruments Act 2003*. Subclause 31(5) confirms this and is included to assist readers.

**Clause 32: Appointment of Director**

77. Clause 32(1)(a) enables the Minister to make the appointment of the first Director of the Gallery. This clause is included because the recruitment and appointment of the first Director will ideally occur before 1 July 2013, to have effect on that day. This will assist in the seamless transition of the Gallery to its new governance structure.

78. From 1 July 2013, the Board of the Gallery will be established and from that point the Board is enabled, by subclause 32(2), to make all subsequent appointments to the position of the Director. However the Board must not appoint a person as Director unless the Minister agrees to the appointment in writing.

79. The Director holds office on a full-time basis (subclause 32(4)), for a period not to exceed five years (subclause 32(5)), and must not be a member of the Board (subclause 32(6)).

80. The note to this clause makes clear that the power to appoint a person as the Director as it is contemplated includes a power to reappoint a person who is already the Director, to that position in accordance with section 33AA of the *Acts Interpretation Act 1901*.

81. An instrument of appointment of a person as Director would not be a legislative instrument, by virtue of the existing exemption under item 9 of Part 1 of Schedule 1 to the *Legislative Instruments Regulations 2004*.

82. It is intended that the appointee to the role of the Director, as a Head of a Statutory Agency (see paragraph 41(2)(b)), has the required skills and experience to undertake the role as described in clause 31.

**Clause 33: Acting appointments**

83. Clause 33 enables the Board, with the agreement of the Minister, to appoint an acting Director during a vacancy in the office of Director or while the Director is absent or unavailable (subclause 33(1)). An instrument of appointment as acting Director would not be a legislative instrument, by virtue of the existing exemption under item 9 of Part 1 of Schedule 1 to the *Legislative Instruments Regulations 2004*.

84. It is envisaged acting arrangements could encompass possible standing arrangements, approved by the Minister in advance, to cover short periods of absence or situations where urgent acting appointments are required.
Clause 34: Other employment

85. Subclause 34(1) makes clear that the Director must not engage in paid employment outside the duties of the Director’s office without the Chair’s approval. The Chair must notify the Minister of any such approval (subclause 34(2)). Such approval would not be a legislative instrument, by virtue of the existing exemption under item 2 of Part 1 of Schedule 1 to the *Legislative Instruments Regulations 2004*.

86. This clause is intended to ensure that the Director does not engage in paid employment that conflicts or could conflict with the proper performance of the Director’s duties.

Clause 35: Remuneration

87. It is intended that the Director is to be a Principle Executive Officer under the *Remuneration Tribunal Act 1973* and is to be paid such remuneration as is determined by the Remuneration Tribunal or, if no determination of that remuneration is in operation, the Director is to be paid such remuneration as is prescribed in the regulations (subclause 35(1)). In addition the Director is to be paid such allowances, if any, as are prescribed in the regulations (subclause 35(2)).

88. Subclause 35(3) makes it clear that subclauses 35(1) and 35(2) have effect subject to the *Remuneration Tribunal Act 1973*.

Clause 36: Leave

89. The Director will have such recreation leave entitlements as are determined by the Remuneration Tribunal (subclause 36(1)).

90. However, subclause 36(2) enables the Chair to grant the Director leave of absence, other than recreation leave, on such terms and conditions as to remuneration or otherwise as the Chair determines. The granting of leave would not be a legislative instrument, by virtue of the existing exemption under item 11 of Part 1 of Schedule 1 to the *Legislative Instrument Regulations 2004*.

91. The Chair must consult the Minister before granting the Director leave for a period exceeding one month (subclause 36(3)).

Clause 37: Disclosure of interests

92. Clause 37 requires that the Director disclose to the Minister and the Board all direct or indirect pecuniary interests that the Director has or acquires which conflict or could conflict with the proper performance of the Director’s duties. Such a disclosure given by the Director is not a legislative instrument under section 5 of the *Legislative Instruments Act 2003*, as it is not legislative in character.
Clause 38: Resignation

93. Clause 38 enables the Director to resign by giving a written resignation to the Chair (subclause 38(1)). Subclause 38(2) requires the Chair to notify the Minister of the resignation. Such a written resignation would not be a legislative instrument, by virtue of the existing exemption under item 10 of Part 1 of Schedule 1 to the Legislative Instruments Regulations 2004.

Clause 39: Termination of appointment

94. Clause 39 sets out the grounds upon which the Board may terminate the appointment of the Director subject to the agreement of the Minister. Pursuant to subclause 39(1), the Board may terminate the appointment of the Director:
   • for misbehaviour;
   • if they are unable to perform their duties due to physical or mental incapacity;
   • if the Director becomes bankrupt, applies to take benefit of any law for relief from bankruptcy or insolvent debtors, or compounds with his or her creditors, or assigns all or part of his or her remuneration for the benefit of creditors;
   • if the Director is absent without leave for 14 consecutive days or for 28 days in any 12 months;
   • if without the approval of the Chair, under clause 34 of the Bill, engages in paid employment outside of the duties of his or her office;
   • if the Director fails, without reasonable excuse, to comply with clause 37 of the Bill, which deals with disclosure of conflicts of interest and possible conflicts of interest.

95. However, the Board may not terminate the appointment of the Director unless the Minister agrees, in writing, to the termination (subclause 39(2)).

96. An instrument of termination of appointment would not be a legislative instrument, by virtue of the existing exemption under item 9 of Part 1 of Schedule 1 to the Legislative Instruments Regulations 2004.

Clause 40: Other terms and conditions

97. Clause 40 enables the Board to determine the terms and conditions on which the Director holds office where those terms and conditions are otherwise not dealt with in this Bill.

98. An instrument specifying terms and conditions of appointment would not be a legislative instrument, by virtue of the existing exemption under item 11 of Part 1 of Schedule 1 to the Legislative Instruments Regulations 2004.

Division 2 – Staff and consultants

Clause 41: Staff

99. Subclause 41(1) provides that the staff of the Gallery must be people engaged under the Public Service Act 1999.
100. For the purposes of the *Public Service Act 1999*, the Director and the staff of the Gallery together constitute a Statutory Agency with the Director as the Head of that Statutory Agency (subclause 41(2)).

101. In performing his or her role as the Head of a Statutory Agency, it is expected that the Director, as far as practical, will act in accordance with any guidance provided by Australian Government Agencies, such as by the Australian Public Service Commission.

**Clause 42: Services of other persons may be made available to the Gallery**

102. Clause 42 enables the Gallery to have persons to assist in the activities of the Gallery, such as those on secondment from other collecting institutions. This would include the secondment of staff from national, State or Territory institutions that may not have staff engaged under the *Public Service Act 1999*.

**Clause 43: Consultants**

103. Clause 43 enables the Gallery to engage contractors, such as consultants, to assist in the performance of its functions. This Clause is included to avoid doubt and is not intended to affect the operation of clause 8 (Powers).

104. An instrument of engagement would not be a legislative instrument, by virtue of the existing exemption under item 9 of Part 1 of Schedule 1 to the *Legislative Instruments Regulations 2004*.

**Part 5 – Planning**

**Clause 44: Corporate plan**

105. The Board must prepare a corporate plan for the Gallery at least once each three year period (subclause 44(1)) and give it to the Minister. The plan must cover a period of at least three years from the time it is made (subclause 44(2)).

106. Subclause 44(3) provides instructions on what details the plan must include. These are:
   - a statement of the objectives that the Gallery will pursue;
   - the strategies and policies that the Gallery will adopt to achieve those objectives; and
   - such other matters (if any) as the Minister requires.

107. The plan may include any other matters, as determined by the Gallery.

108. Subclause 44(4) requires the Chair of the Board to keep the Minister informed of any changes to the plan and matters that might significantly affect the achievement of the objectives set out in the plan.

109. Subclause 44(5) enables the Minister to give the Board written guidelines which the Chair must use in deciding what matters are covered by 44(3)(c) ‘other matters … as
the Minister requires’ or 44(4)(b) ‘matters that might significantly affect the achievement of the objectives set out in the plan’.

110. Any guidelines given by the Minister in relation to the Corporate Plan are administrative in effect and not legislative in character, therefore will not be a legislative instrument under section 5 of the Legislative Instruments Act 2003. For the avoidance of doubt, subclause 44(6) provides that these guidelines are not legislative instruments. This subclause is included to assist readers.

111. A corporate plan would not be a legislative instrument, by virtue of the existing exemption under item 34 of Part 1 of Schedule 1 to the Legislative Instruments Regulations 2004.

112. For the purposes of this Clause, and in line with usual practice for corporate plans, a year would be a financial year covering a period from 1 July in any year until 30 June in the following year.

Part 6 – Finance

Clause 45: Money payable to the Gallery

113. Subclause 45(1) makes it clear that money appropriated by the Parliament from the Consolidated Revenue Fund for the purposes of the Gallery is payable to the Gallery.

114. Subclause 45(2) enables the Finance Minister, or the Minister administering the FMA Act, to give directions about the amount and timing of payments made to the Gallery under this clause (subclause 37(2)). A direction made by the Finance Minister in accordance with this subclause is administrative, not legislative in character and therefore would not be a legislative instrument under section 5 of the Legislative Instruments Act 2003. Subclause 45(3) confirms this and is included to assist readers.

Clause 46: Application of money by the Gallery

115. Subclause 46(1) provides that the money of the Gallery, including all money that is appropriated to the Gallery under clause 45 and other money, is to be applied only in payment or discharge of the direct or indirect costs, expenses and other obligations incurred or undertaken by the Gallery in the performance of its functions and the exercise of its powers, and in payment of any remuneration or allowances payable under this Bill.

116. Subclause 46(2) makes it clear that subclause 46(1) does not prevent the Gallery investing surplus money under section 18 of the CAC Act.

Clause 47: Restrictions on financial transactions

117. Clause 47(1) provides that the Gallery must not, without the written approval of the Minister:
   • acquire any property, right or privilege for a consideration exceeding in amount or value the amount prescribed by the regulations;
● dispose of any property, right or privilege if the amount or value of the consideration for the disposal, or the value of the property, right or privilege, exceeds the amount prescribed by the regulations;
● enter into a contract for the construction of a building for the Gallery, being a contract under which the Gallery is to pay an amount exceeding the amount prescribed by the regulations; or
● enter into a lease of land for a period exceeding 10 years.

118. Paragraphs 47(1)(a) and 47(1)(b) do not apply to the investment of money by the Gallery under section 18 of the CAC Act (subclause 47(2)).

119. An approval given by the Minister under subclause 47(1) is administrative in effect and therefore not a legislative instrument under section 5 of the Legislative Instruments Act 2003. Subclause 47(3) confirms this and is included to assist readers.

Clause 48: Taxation

120. Clause 48 makes it clear that the Gallery is not subject to taxation under any law of the Commonwealth or of a State or Territory.

121. However the note to this clause explains that despite this clause the Gallery may be subject to taxation under certain laws, for example section 177-5 of the A New Tax System (Goods and Services Tax) Act 1999 and section 66 of the Fringe Benefits Tax Assessment Act 1986).

Part 7 – Other matters

Clause 49: Annual reports

122. Under section 9 of the CAC Act, the Gallery is required to prepare an annual report to be tabled in Parliament by the Minister. Clause 49 of the Bill provides that the report must, for the period covered by the report, include particulars of any land, buildings and structures made available to the Gallery under clause 9 of this Bill and information on any disposals of items in the national collection made under clause 11 of this Bill.

Clause 50: Ministerial direction

123. Clause 50 enables the Minister, by legislative instrument, to give written directions to the Board in relation to the performance of the functions of, and the exercise of the powers of, the Gallery.

124. The Minister may also, by legislative instrument, require the provision of a report or advice on matters relating to any of the Gallery’s functions or powers (subclause 50(1)(b)).

125. The note to the clause makes clear that section 42 of the Legislative Instruments Act 2003, which provides for disallowance, does not apply to directions given by the Minister under subclause 50(1) by virtue of the existing exemption under item 41 of the table in subsection 44(2) of that Act. The note further makes clear that the
sunsetting provision in Part 6 of the *Legislative Instruments Act 2003* will not apply to a direction given under subclause 42(1), by virtue of item 46 of the table in section 54(2) of that Act.

126. Subclause 50(2) provides that a direction by the Minister must be of a general nature only. This relates to, but is not limited to, a decision by the Gallery to provide support to a particular person (such as under clause 8(2)(e)).

127. The Board must ensure that any direction given by the Minister under subclause 50(1) is complied with (subclause 50(3)).

128. It is not intended that clause 50 would operate to limit section 16 of the CAC Act. However, it is intended that subclause 50(1)(b) includes the power to give directions in relation to specific matters and not just the general operations of the Gallery (as per section 16 of the CAC Act).

**Clause 51: Delegation by the Minister**

129. This Clause enables the Minister to delegate in writing all or any of his or her functions or powers under the Bill, with the exception of the functions and powers under:
   - clause 9 (to make available Commonwealth land and buildings);
   - clause 16 (to appoint Board Members);
   - clause 17 (to appoint acting Board members);
   - clause 21 (to terminate the appointment of Board members);
   - clause 32 (to agree to the appointment of Director);
   - clause 39 (to agree to the termination of appointment of the Director); or
   - clause 50 (the ability to give Ministerial directions);
   to the Secretary of the Department, or to a Senior Executive Service employee or acting Senior Executive Service employee of the Department.

130. A delegate under this clause must, in exercising functions or powers under a delegation, comply with any directions of the Minister (subclause 51(3)).

131. Such a delegation is not a legislative instrument under the exemption in item 1 of Part 1 of Schedule 1 to the *Legislative Instruments Regulations 2004*

**Clause 52: Supply of liquor on Gallery premises**

132. Subclause 51(1) will enable regulations to be made relating to the sale, supply, disposal, possession or control of liquor on the Gallery’s premises. Subclause 52(2) makes clear that the laws of the Australian Capital Territory relating to the sale, supply and disposal of liquor will not apply to the Gallery’s premises in the event that such regulations are made.

**Clause 53: Control of Gallery land and buildings etc.**

133. This provision enables regulations to be made to give the Gallery control over its land and buildings by regulating, restricting or prohibiting entry onto its land and buildings and by regulating the conduct, and allowing the removal, of persons.
In accordance with other similar collecting institutions and international standards of museum management the control of persons at the Gallery may be necessary on such issues as:

- the use of cameras and equipment;
- the safety of the national collection, the public and staff (including vandalism of works of art and related material in the ownership of the Gallery or on loan to them);
- the control of food, liquid and animals in the building.

**Clause 54: Regulations**

Subclause 54(1) enables the Governor-General to make regulations prescribing matters required or permitted by this Bill to be prescribed or necessary or convenient to be prescribed for carrying out or giving effect to this Bill.

It is expected that regulations may need to be made in accordance with this subclause in relation to certain matters under this Bill including:

- to establish the limits on financial transactions, where approval must be given by the Minister (clause 47);
- to detail the particular aspects in regard to the control of land and buildings (clause 53); and
- that relate to the sale, supply, or control of liquor on the Gallery’s premises (clause 52).

Subclause 54(2) provides that any regulations may prescribe penalties, not exceeding 50 penalty units (which would currently amount to $5,500), for offences against the regulations.

It is expected that offences will primarily relate to regulations that are made regulating the conduct of persons at the Gallery and in relation to the land and buildings.

Any such regulations are legislative instruments under section 6(a) of the *Legislative Instruments Act 2003*. 